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the Commonwealth. Judgment for petitioner, and the Commonwealth brings error. Reversed.

*The Attorney General*, for the Commonwealth.  
*Loyall, Taylor & White*, for defendant in error.

ATLANTIC COAST LINE R. CO. *v.* CAPLE'S ADM'X.

Jan. 13, 1910.

[66 S. E. 855.]

**1. Master and Servant (§ 291\*)—Injuries—Actions—Instructions—Misleading Instructions.**—The modification of a requested instruction in a servant's injury action by inserting the quoted words that, if decedent was injured as a mere accident, "not caused in any manner by defendant's fault or negligence," the jury must find for defendant, though they may believe that decedent was also free from fault, was calculated to confuse and mislead the jury, and the instruction should have been given without such modification.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1146; Dec. Dig. § 291.\* 9 Va.-W. Va. Enc. Dig. 721, 722; 7 id. 727.]

**2. Master and Servant (§ 291\*)—Instructions—Necessity.**—Where the employer's theory in a servant's death action, that the injuries were caused by an accident, was supported by sufficient testimony, a proper instruction should have been submitted on that theory.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1136; Dec. Dig. § 291\* 7 Va.-W. Va. Enc. Dig. 707.]

**3. Master and Servant (§ 291\*)—Injuries—Actions—Instructions—Conformity to Pleading.**—In an action against a railroad company for a switchman's death, defendant requested an instruction that, notwithstanding certain acts of negligence alleged by plaintiff, if the jury further believe that decedent's death was caused by his missing his hold "by his own fault or misfortune, and not because of defendant's fault or negligence," while ascending the car ladder, thereby falling in front of the car, and that ascending such ladders was a part of his duty, and he had sufficient experience to know how to perform it, the jury must find for defendant, and another instruction requested by defendant was that if the jury believed it as probable that the accident happened by decedent falling from the car, as that he was jerked from the engine as alleged, they should find for defendant. The theory of the declaration was that decedent was on the back of the engine when injured, drawing the coupling pin, and that the engineer negligently, without signal, suddenly increased speed and jerked decedent upon the track in front of the cars following the engine. Held, that the modification of the first instruction by inserting the quoted words permitted the jury to find for plaintiff whether the negligence causing the injury was alleged in the declaration or

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\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

not; the purpose of both instructions being to limit plaintiff's proof to the allegations of the declaration, and they should have been given as requested.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1136-1139; Dec. Dig. § 291.\* 10 Va.-W. Va. Enc. Dig. 400, 412, et seq.]

**4. Master and Servant (§ 291\*)—Instructions—Ignoring Issues.**—The instruction as modified ignored defendant's theory that decedent fell from the car ladder by missing his hold after the engine had been uncoupled.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1139; Dec. Dig. § 291.\* 10 Va.-W. Va. Enc. Dig. 400, 412, et seq.]

**5. Pleading (§ 387\*)—Proof—Variance.**—Plaintiff cannot allege one set of facts and recover upon proof of another set of facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1300; Dec. Dig. § 387.\* 10 Va.-W. Va. Enc. Dig. 400; 13 id. 478.]

**6. Master and Servant (§ 291\*)—Injuries—Actions—Instructions—Conformity to Issues—Contributory Negligence.**—An instruction, in an action for a servant's death, which authorized recovery if defendant was negligent and such negligence proximately caused his death, but which omitted the question of contributory negligence, which was pleaded, and which the evidence tended to support, was erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1139, 1144; Dec. Dig. § 291\* 4 Va.-W. Va. Enc. Dig. 258; 10 id. 413.]

**7. Trial (§ 290\*)—Instructions—Defects Cured by Other Instructions—Conflicting Instructions.**—Error in an instruction in authorizing a recovery if the deceased servant's death was proximately caused by defendant's negligence without mentioning contributory negligence, which was an issue, was not cured by an instruction given for defendant on contributory negligence, as the instructions were conflicting so that it could not be determined which controlled the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. § 296.\* 7 Va.-W. Va. Enc. Dig. 744; 14 id. 565.]

**8. Master and Servant (§ 296\*)—Injuries—Instructions—Negligence.**—Instructions, in a servant's injury action, which state the law as to the employer's duties, should not, as a rule, direct a verdict for the employee unless they also state his duty to exercise reasonable care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1180; Dec. Dig. § 296.\* 4 Va.-W. Va. Enc. Dig. 258; 10 id. 413; 14 id. 773.]

**9. Evidence (§ 507\*)—Opinion Evidence—Subjects of Expert Testimony.**—Where all of the facts relating to the question in contro-

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\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

versy were fully before the jury and easily understood, expert opinion on the question was not competent; the jury being as capable of drawing an inference from the facts as the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2310; Dec. Dig. § 507.\* 5 Va.-W. Va. Enc. Dig. 777.]

**10. Evidence (§ 471\*)—Opinion Evidence—Admissibility.**—As a rule witnesses can only testify to facts and cannot give their opinions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2149; Dec. Dig. § 471.\* 5 Va.-W. Va. Enc. Dig. 792.]

Error from Corporation Court of Manchester.

Action by Caple's administratrix against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

*Edwin P. Cox and Wm. B. McIlwaine*, for plaintiff in error.  
*O'Flaherty & Fulton and Geo. J. Hooper*, for defendant in error.

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NORFOLK & W. RY. CO. *v.* SOLLENBERGER'S ADM'R.

Jan. 13, 1910.

[66 S. E. 857.]

**Evidence (§ 568\*)—Opinion Evidence.**—The probative value of the opinion of a witness that a train could have been stopped in time to have avoided injury to a servant negligently on the track falls where it appears that the witness was in error as to the most essential condition on which the opinion was predicated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2392; Dec. Dig. § 568.\* 5 Va.-W. Va. Enc. Dig. 792.]

On petition for rehearing. Denied.

For former opinion, see 66 S. E. 726.

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\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.